



Honorable Gary Spraker
United States Bankruptcy Judge



Entered on Docket
March 30, 2022

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

DESERT OASIS APARTMENTS, LLC,

Debtor.

Chapter 11

Case No.: 18-12456-gs

Hearing Date: October 1, 2021

Hearing Time: 9:30 a.m.

**MEMORANDUM DECISION ON FEE APPLICATION OF SPECIAL COUNSEL
PACHULSKI STANG ZIEHL & JONES LLP**

After chapter 11 trustee Kavita Gupta (Trustee Gupta) liquidated the Desert Oasis Apartments, LLC's (Apartments) real property, she retained Pachulski Stang Ziehl & Jones LLP (Pachulski Stang) as special counsel to resolve a claim filed by Apartments' affiliated debtor Desert Land, LLC (Desert Land), then also in chapter 11. The claim was for an amount not less than \$78 million, though the basis for it was vaguely stated. The law firm dove into the matter aggressively. In response, Desert Land reduced its claim to \$4,500,000. After conversion to chapter 7, the Desert Land estate settled for payment of \$425,000, though the funds came out of another creditor's distribution rather than directly from the Apartments' estate.

Pachulski Stang now seeks approval of its first fee application in the amount of \$211,680 in fees and \$443.74 in expenses (Application).¹ In support of its Application, it points to the

¹ Apartments ECF No. 373.

1 amount of the claim defeated. No one disputes that the law firm aggressively challenged the
2 claim; but there is substantially more to this story. The remaining creditor of the estate objects to
3 the Application as excessive and beyond the scope of employment. The creditor is also the
4 entity that funded the settlement of the Desert Land claim.

5 This case is intertwined with Desert Land, and they have a significant history. As
6 mentioned at the hearing to employ Pachulski Stang, that history colored special counsel's
7 employment. It also lays heavy over its Application. This is largely why the court took the
8 somewhat unusual step of conducting an evidentiary hearing on the Application and objection. It
9 was necessary to enable the court to understand the context of the law firm's services and
10 billings. During the hearing, the court heard testimony from Trustee Gupta, her general
11 bankruptcy counsel, and the objecting creditor's counsel.

12 Together with its affiliated cases, the bankruptcy cases have generated substantial fees to
13 liquidate assets that were significantly overvalued. During the endgame of this bankruptcy,
14 special counsel billed over \$200,000 to address a vague claim for millions of dollars that had
15 already been examined and evaluated by general counsel. Bankruptcy courts afford trustees and
16 their counsel extensive discretion to administer bankruptcy estates. But this is not a blank check.
17 Fundamentally, professionals of a bankruptcy estate must exercise billing judgment. The
18 objection raised is that Trustee Gupta set loose expensive specialists to knock over a house of
19 cards. They did so but neither took into consideration the state of the bankruptcy case or the
20 interests of the sole remaining creditor. This is not an enjoyable exercise, but it is an important
21 one. As such, the court will detail the context that impacts its decision to reduce the fees
22 requested by Pachulski Stang.
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24 **FACTS**

25 **A. The Prologue.**

26 Apartments, Desert Land and Desert Oasis Investments, LLC (Investments) are related
27 entities and no strangers to bankruptcy. Combined, the three debtors owned roughly 36 acres on
28 the southern end of the Las Vegas Strip. Bradley B. Busbin, as Trustee of the Gonzales

1 Charitable Remainder Unitrust One (Busbin) is the successor in interest to Tom Gonzales's
2 claims against Desert Land and Apartments. Gonzales lent \$40,000,000 to Desert Land and
3 Apartments in 2000 secured by their real property, commonly referred to as "Parcel A." After
4 Desert Land and Apartments defaulted on the loan, they filed their original chapter 11
5 bankruptcy in 2002. As part of that jointly administered bankruptcy, Gonzales agreed to a
6 settlement with those debtors. The settlement extinguished Gonzales's promissory note and
7 released his deed of trust in exchange for certain ownership interests in a nondebtor entity and an
8 agreement that Desert Land and Apartments would pay Gonzales \$10,000,000 upon the transfer
9 of Parcel A.

10 Foreshadowing most of the next 20 years, the parties could not agree on the language of
11 the settlement reached in the 2002 bankruptcy and began litigation. Appeals ensued. Gonzales
12 has maintained that the settlement gave him a senior encumbrance against Desert Land's real
13 property. Desert Land and Apartments subsequently encumbered their real property with deeds
14 of trust ultimately exceeding hundreds of millions of dollars in the aggregate. Gonzales
15 responded by filing lawsuits in 2011, 2013, and 2015 in an attempt to establish his senior interest
16 in Parcel A and to recover the \$10,000,000. Desert Land and Apartments again filed for chapter
17 11 in 2011 and confirmed plans of reorganization. The vacant portions of Parcel A were never
18 developed.

19 In 2018, the United States District Court for the District of Nevada ultimately entered
20 judgment in Gonzales' favor and against Desert Land, Apartments and Investments for more
21 than \$14,000,000. Gonzales recorded the judgment and shortly thereafter placed Apartments and
22 Desert Land, together with Investments, into separate involuntary chapter 7 bankruptcy cases on
23 April 30, 2018.² The debtors consented to the bankruptcy and converted their cases to chapter
24 11.³

27 ² Originally the case was assigned to the Hon. Laurel Babero. On November 28, 2018, the case
28 was reassigned. Desert Land ECF No. 338.

³ Desert Land ECF No. 79.

B. Appointment of the Chapter 11 Trustee and Sale of the Real Property.

The bankruptcy cases were jointly administered.⁴ Early in the cases, however, the debtors sought to substantively consolidate their separate bankruptcy estates.⁵ Several creditors opposed substantive consolidation. The court denied the motion without prejudice.⁶

On July 23, 2018, Busbin filed his motion for appointment of a chapter 11 trustee.⁷ The hearing on that motion was continued numerous times, primarily based on the debtors' stated efforts to sell their combined real property.

On September 27, 2018, the debtors filed their plan of reorganization⁸ and motion to sell the real property.⁹ Both documents valued the combined real estate at significantly more than the combined total secured debt. The motion to sell sought approval for a sale of the assets of the estate for a net purchase price of \$415,800,000 to newly created entities that would own the real property. Ownership of these newly created entities was unclear and drew objections.

The proposed plan was based upon the debtors' sale of the combined real property, but it also included a provision that the real property would be sold by auction within 15 months from confirmation if the debtors were unsuccessful (and the required secured creditors did not agree to an extension). The disclosure statement supporting the plan relied upon an appraisal dated October 26, 2017, valuing the aggregate real property at \$460,000,000.¹⁰ The debtors amended the disclosure statement and plan several times. Ultimately, both the motion to sell and plan confirmation fell through.

⁴ Desert Land ECF No. 90.

⁵ Desert Land ECF No. 9.

⁶ Desert Land ECF No. 89.

⁷ Desert Land ECF No. 121.

⁸ Desert Land ECF No. 253.

⁹ Desert Land ECF No. 249.

¹⁰ Desert Land ECF No. 254.

1 At a hearing held on March 11, 2019, the court granted the motion for appointment of a
2 chapter 11 trustee and entered its order on March 21, 2019.¹¹ On April 2, 2019, the court entered
3 its order approving appointment of Trustee Gupta as the chapter 11 trustee for the Desert Land
4 and Apartments bankruptcy estates.¹² She retained the Nuti Hart law firm of Oakland, California
5 as her counsel.¹³ Kevin Coleman has served as lead counsel for the trustee.

6 Trustee Gupta retained professionals to list and market the properties. She filed her
7 Motion to (A) Approve Bid Procedures and Form of Purchase and Sale Agreement; (B) Set
8 Auction Date and Sale Hearing; and (C) Grant Related Relief on December 19, 2019.¹⁴ With the
9 onset of the Covid-19 pandemic in early 2020, a number of creditors sought to delay the sale of
10 the real property. But even prior to the pandemic, Trustee Gupta had concluded that the real
11 property would not sell for more than the total secured debt.¹⁵ In light of this the court denied the
12 requests to continue the sale of the real property.

13 On June 5, 2020, the court auctioned the properties. Trustee Gupta sold Apartments' real
14 property for \$15,600,000, less \$347,355.00 in adjustments, commissions, and closing charges.¹⁶

15 On June 12, 2020, Trustee Gupta resigned as the chapter 11 trustee for the Desert Land
16 estate. Several days later the court entered its order granting the United States Trustee's motion
17 to appoint Trustee Golden as chapter 11 trustee for the Desert Land estate.¹⁷ The estate retained
18 the Brutzkus Gubner law firm as counsel.¹⁸ Jerrold Bregman has served as the lead attorney for
19 the estate.
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24 ¹¹ Desert Land ECF No. 519.

25 ¹² Desert Land ECF No. 528.

26 ¹³ Desert Land ECF No. 679.

27 ¹⁴ Desert Land ECF No. 956.

28 ¹⁵ See Desert Land ECF No. 1055-1.

¹⁶ Desert Land ECF No. 1264. The deductions disbursed at closing are detailed in the Report of Sale at ECF No. 1355.

¹⁷ Desert Land ECF No. 1281.

¹⁸ Desert Land ECF No. 1421.

C. Post-Sale Administration of the Estate and Retention of Pachulski Stang as Special Counsel.

On July 20, 2020, The Northern Trust Company (Northern Trust) filed its Motion to Disburse Proceeds (Motion to Disburse) from the sale of Apartments' real property.¹⁹ Northern Trust claimed a senior secured interest in the real property and the resulting sale proceeds pursuant to its recorded deeds of trust. Busbin, however, has challenged the seniority of Northern Trust's deeds of trust in an adversary proceeding. Prior to the auction of the estate's real property, the court granted summary judgment in *Busbin v. Shotgun Creek Investments, LLC, Shotgun Creek Las Vegas, LLC, Shotgun Investments Nevada, LLC, and The Northern Trust Company*, Adv. Case No. 19-01108-gs, holding that Northern Trust's deed of trust was senior to any encumbrance or interest Busbin might have against Apartments' real property.²⁰ Though Busbin opposed the motion, the court entered its Order Directing Trustee to Disburse Proceeds to the Northern Trust Company.²¹ The court directed that Trustee Gupta pay \$5,494,863.03 (as calculated through August 7, 2020) to Northern Trust on account of its deed of trust against Apartments' real property sold at auction.²²

On August 17, 2020, the court terminated the joint administration of the bankruptcy estates in light of the sales of the real property.²³

On August 21, 2020, Desert Land Loan Acquisition, LLC (DLLA) filed its Motion to Dismiss the Desert Land bankruptcy (Motion to Dismiss).²⁴ While the Motion to Dismiss was pending, Trustee Golden filed a proof of claim in the Apartments bankruptcy on behalf of the Desert Land estate. The claim was stated to be for at least \$78 million. Trustee Golden attached an addendum to the claim explaining that he was seeking to recover a \$4.5 million debt previously listed in Apartments' Schedule F and previously scheduled for \$5,468,103.96 in

¹⁹ Desert Land ECF No. 1368.

²⁰ After denying Busbin's request for a stay pending appeal, the District Court recently affirmed this court's decision. *See* USDC Appeal No. 20-01299-JCM, ECF Nos. 46-47.

²¹ Desert Land ECF No. 1456.

²² *Id.*

²³ Desert Land ECF No. 1439.

²⁴ Desert Land ECF No. 1449.

1 Apartments' 2011 chapter 11 bankruptcy case (though it was subordinated to the general
 2 unsecured claims as part of a confirmed plan).²⁵ The addendum stated that the balance of the
 3 claim was based upon theories of substantive consolidation of the two estates or alter ego
 4 liability. The addendum further referenced a statement from one of Desert Land's principals that
 5 the entities had used available funds to pay the expenses of all entities.²⁶

6 The next day, Mr. Coleman from Nuti Hart emailed Mr. Bregman with Brutzkus Gubner
 7 to discuss conflicts of interest.²⁷ Mr. Coleman asked if Desert Land would waive any conflict
 8 associated with Apartments' objection to Desert Land's proof of claim resulting from his firm's
 9 prior representation of the Desert Land chapter 11 estate. Mr. Coleman advised that if Trustee
 10 Golden would not waive the conflict, Apartments would "arrange for the Gonzales Trust or
 11 special counsel to handle the objection."²⁸ Trustee Golden declined to waive the conflict and
 12 requested Mr. Coleman turn over all Desert Land files.²⁹ Mr. Coleman agreed to do so. Mr.
 13 Coleman also represented that he would not communicate with conflict counsel concerning the
 14 objection to the claim.
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16 On October 12, 2020, the Apartments estate's professionals filed a supplemental disclosure
 17 under Fed. R. Bankr. P. 2014(a).³⁰ Specifically, the professionals disclosed a statement by Mr.
 18 Bregman that Trustee Gupta's "resignation confirmed an actual conflict existed, which conflict
 19 appears to have arisen prior to actions which harmed the Desert Land estate (i.e. de-scheduling of
 20 \$4.5MM A/R, \$1MM credit for DLLA, etc.)."³¹ The supplemental disclosure discussed in some
 21 detail the events that led the representatives of Desert Land and Apartments to amend the schedules
 22 to remove the \$4.5 million account stated.³² The supplemental disclosure was supported by a
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24 ²⁵ Apartments ECF No. 409, Exhibit 1, pp. 5-6.

25 ²⁶ *Id.* at p. 7.

26 ²⁷ Apartment ECF No. 411, Amended Exhibit 2.

27 ²⁸ *Id.* at p. 3.

28 ²⁹ Apartments ECF No. 412, Exhibit 3.

³⁰ Apartments ECF No. 175.

³¹ *Id.* at Exhibit 1.

³² *Id.* at pp. 2-3.

1 declaration from Gina Shelton, the staff accountant and bookkeeper that provided bookkeeping
 2 and tax preparation services for Desert Land and Apartments. Ms. Shelton explained why she had
 3 come to understand that the amount shown in Apartments' and Desert Land's general ledgers and
 4 working trial balance for the amounts Apartments owed to Desert Land were overstated by roughly
 5 \$5,000,000.³³

6 Also on October 12, 2020, John Fiero with Pachulski Stang entered his appearance as
 7 special litigation counsel in the Apartments bankruptcy.³⁴ The law firm began billing the estate
 8 on October 15, 2020.

9 On October 28, 2020, Trustee Gupta filed her application to employ Pachulski Stang as
 10 special litigation counsel (Employment Application).³⁵ The Employment Application sought to
 11 employ the law firm "to represent the Trustee in connection with the investigation and objection
 12 to the [Desert Land] Claim."³⁶ The Employment Application identified Mr. Fiero and Gail
 13 Greenwood as the attorneys who would work on the matter. Each agreed to bill their time at no
 14 higher than \$800 per hour, which was a reduced hourly rate for both.³⁷ The Application listed
 15 the lowest hourly rate for attorneys at \$650 per hour and paralegals at \$425 per hour.³⁸

16 Mr. Fiero's declaration in support of the Employment Application stated that his firm
 17 was to be employed to "undertake such tasks as required by the Trustee," including "[a]dvising
 18 the Trustee concerning...the administration of the estate" and "[r]endering such other services as
 19 the Trustee may require in connection with this case or the Claim."³⁹ Mr. Fiero's declaration
 20 included the assurance that Pachulski Stang would "staff the case among other attorneys at the
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25 ³³ *Id.* at Exhibit 5, pp. 4-5.

26 ³⁴ Apartments ECF No. 176.

27 ³⁵ Apartments ECF No. 187.

28 ³⁶ *Id.* at p. 4.

³⁷ *Id.* at p. 5:14-16.

³⁸ *Id.* at p. 6:3-9.

³⁹ Apartments ECF No. 188, pp. 2-3, ¶ 5.

1 Firm in the most cost-efficient manner possible.”⁴⁰ The Employment Application was scheduled
2 for a hearing on December 10, 2020.

3 Well before the hearing on the Employment Application, Pachulski Stang drafted and
4 sent a Rule 11 Notice to Brutzkus Gubner requesting that Trustee Golden withdraw the Desert
5 Land proof of claim (Rule 11 Notice).⁴¹ The Rule 11 Notice attached a draft Motion for
6 Monetary Sanctions Against Jeffrey Golden, Chapter 11 Trustee of Desert Land, LLC, Pursuant
7 to Bankruptcy Rule 9011. Both the Rule 11 Notice and the motion focused upon Desert Land’s
8 claim for damages under both components: the account stated and substantive consolidation or
9 alter ego.

10 On December 1, 2020, Steven Gubner responded to the Rule 11 Notice (Rule 11
11 Response) for the Desert Land estate.⁴² The Rule 11 Response is 11 pages long and includes 452
12 pages as attachments. The discussion of substantive consolidation is limited to footnote number
13 1, which advised that the Rule 11 Response did not discuss the substantive consolidation
14 component but stated that it was premised on the conflicting testimony presented in 2018. The
15 footnote acknowledged that the bankruptcy court denied the prior motion for substantive
16 consolidation but noted that the denial was without prejudice.⁴³

17 On December 8, 2020, Trustee Golden filed a response to various joinders to DLLA’s
18 Motion to Dismiss in the Desert Land bankruptcy.⁴⁴ In it, he listed his proof of claim in the
19 Apartments bankruptcy as a significant, unadministered asset weighing against dismissal. The
20 discussion of that claim, however, was limited to the \$4.5 million debt, though the response
21 included a vague reference that “the claim may be allowed in an amount significantly more than
22 that.”⁴⁵
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25 ⁴⁰ *Id.* at ¶ 7.

26 ⁴¹ Apartments ECF No. 416, Exhibit No. 7a.

27 ⁴² Apartments ECF No. 418, Exhibit No. 8.

28 ⁴³ *Id.* at 2.

⁴⁴ Desert Land ECF No. 1557.

⁴⁵ *Id.* at 4:17.

Also on December 8, 2020, Pachulski Stang filed an amended Employment Application.⁴⁶ The amended Employment Application is substantially similar to the Employment Application. It was accompanied by the supplemental declaration of Mr. Fiero, who disclosed that the U.S. Trustee sought additional conflicts checks from the firm.⁴⁷ None of the additional checks affected Pachulski Stang's disinterestedness for purposes of employment.

On the December 10, 2020 miscellaneous motion calendar, the court heard Pachulski Stang's application to be employed as special litigation counsel. At that hearing, the court stated that in light of the maturity of the bankruptcy case, it was unclear why special counsel was necessary.⁴⁸ The undersigned plainly said he was "very, very concerned about the cost of this case,"⁴⁹ and asked why he should approve Pachulski Stang's employment at \$650-\$800 per hour when local options were available at a reduced rate.⁵⁰ The court further noted that the \$78 million claim at issue was rejected by Judge Babero two years prior.⁵¹ Mr. Bregman added on the record that Trustee Golden intended to file an amendment reducing Desert Land's proof of claim to \$4.5 million.⁵² Mr. Fiero advised the court that "the concern that there is going to be a tremendous amount of fees charged...while valid, is unlikely."⁵³ Mr. Fiero reiterated that Pachulski Stang's "employment is limited to questions involving the proof of claim of Trustee Golden."⁵⁴

The court initially expressed an intent to continue the hearing on Pachulski Stang's employment to find out from Trustee Gupta how many hours the firm had already billed.⁵⁵ At no time during the December 10, 2020 hearing did Mr. Fiero reveal to the court that Pachulski Stang

⁴⁶ Apartments ECF No. 223.

⁴⁷ Apartments ECF No. 224.

⁴⁸ Apartments ECF No. 227 at p. 5:21-24.

⁴⁹ *Id.* at p. 7:20-21.

⁵⁰ *Id.* at p. 8:14-17.

⁵¹ *Id.* at p. 7:17-20.

⁵² *Id.* at p. 9:1-11.

⁵³ *Id.* at p. 10:7-9.

⁵⁴ *Id.* at p. 16:22-23.

⁵⁵ *Id.* at p. 10:20-25.

1 had already incurred over \$100,000 in fees as of the date of the hearing on its employment. Instead
 2 of continuing the hearing, in light of the lack of opposition and assurances from Mr. Fiero, the
 3 court ultimately approved the application to employ Pachulski Stang. While granting the
 4 Employment Application, the court cautioned Mr. Fiero it would be critically examining the firm's
 5 fee application(s) for efficiency and necessity of services rendered.⁵⁶ Specifically, the court
 6 approved employment "with it expressly stated that the [c]ourt reserves the right, regardless of the
 7 application, to review the reasonableness of the fees upon application for payment, that no travel
 8 time will be allowed, and subject to the [c]ourt's concerns regarding the differential in the...hourly
 9 fees between the application as stated and what the [c]ourt considers to be the average fees for
 10 similar work at the similar level within the Las Vegas metropolitan area."⁵⁷

11 At the conclusion of the hearing on Pachulski Stang's Employment Application, Mr.
 12 Fiero attempted to credit his firm with reducing Trustee Golden's proof of claim by 94% and
 13 offered to "prove the value proposition at the time our fee application is submitted."⁵⁸ The court
 14 largely discounted this argument. Rather, the court again pointed out the maturity of the case,
 15 and that the substantive consolidation issues had already been adjudicated by the court.
 16 Moreover, the court advised that he himself had repeatedly discounted the substantive
 17 consolidation theory.⁵⁹

18 The court entered the order approving Pachulski Stang's employment on December 22,
 19 2020 (Employment Order).⁶⁰ The firm's employment was effective as of October 15, 2020. The
 20 Employment Order did not contain the limiting language regarding the firm's forthcoming fee
 21 applications discussed on the record at the December 10, 2020 hearing.

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26 ⁵⁶ *Id.* at pp. 22:6-23:1.

27 ⁵⁷ *Id.* at p. 23:7-15.

28 ⁵⁸ *Id.* at p. 24:11-18.

⁵⁹ *Id.* at pp. 24:20-25:6.

⁶⁰ Apartments ECF No. 229.

D. The Motion to Dismiss the Desert Land Bankruptcy.

The court also heard DLLA's Motion to Dismiss the Desert Land bankruptcy on December 10, 2020, the same day as the Employment Application. Though a number of creditors had originally opposed, or expressed concerns over dismissal, by the time of the hearing, substantially all the active creditors of the Desert Land estate had either joined the motion or stated their ambivalence to dismissal. The creditors explained that dismissal was in their respective best interests as the most efficient means to conclude the bankruptcy and disburse what limited funds the estate had recovered, primarily through surcharge or carveout from the sale of the real property. Trustee Golden opposed dismissal. He pointed to his recently filed adversary action against Desert Land's insiders,⁶¹ and the \$4.5 million claim against Apartments as assets needing administration.

After considerable discussion, the court found that cause existed under § 1112(b) to either dismiss or convert the Desert Land bankruptcy case. The court initially expressed its inclination to convert the case in light of the assets identified by Trustee Golden. But based upon the arguments presented by the creditors, the court was convinced to accept their preference for dismissal as "a knowing decision by sophisticated creditors with capable counsel and I defer to that."⁶² The parties were sanguine that the estate was administratively insolvent, but agreed that the monies held by the estate were to be distributed pro-rata to allowed administrative expenses. The court stated that it would set a deadline for filing administrative expenses prior to entering any order of dismissal.

On December 15, 2020, Trustee Golden amended his proof of claim in the Apartments bankruptcy, reducing it to \$4.5 million and eliminating any reference to substantive consolidation.

⁶¹ Trustee Golden commenced *Golden v. Bulloch et al.*, 20-01156-gs, with the filing of a complaint on November 3, 2020.

⁶² Desert Land ECF No. 1565 at p. 55.

As the motions for administrative expense worked their way through the Desert Land bankruptcy, Trustee Golden filed his Supplemental Opposition to the Motion to Dismiss (Supplement).⁶³ DLLA opposed the Supplement. Because the court had not entered its order, the Motion to Dismiss technically remained pending. Nonetheless, the court effectively treated the Supplement as a motion to alter or amend its oral ruling. On March 11, 2021, the court held a hearing on the matter. On April 2, 2021, the court gave its oral ruling reversing its prior decision and converting the Desert Land bankruptcy to chapter 7. The order of conversion was entered on April 9, 2021.⁶⁴ Trustee Golden was appointed as the chapter 7 trustee and Brutzkus Gubner was retained as counsel for Desert Land's chapter 7 estate.

E. Plan Confirmation in the Apartments Bankruptcy.

On January 26, 2021, Trustee Gupta filed the joint plan of reorganization in the Apartments case (Plan).⁶⁵ The Plan drew opposition from Trustee Golden,⁶⁶ Northern Trust,⁶⁷ and the United States Trustee.⁶⁸ Its filing also spawned additional motion practice, such as Northern Trust's motion to allow it to vote on the Plan⁶⁹ and Trustee Golden's motion to allow the Desert Land proof of claim for purposes of confirmation.⁷⁰ Trustee Gupta's various responses to the briefings were filed by Nuti Hart, and Mr. Coleman presented the arguments for confirmation at hearings held on March 11, 2021⁷¹ and April 30, 2021.

After taking the matter under advisement, on June 15, 2021, the court confirmed the Plan.⁷² Pursuant to the confirmed Plan, Trustee Gupta, acting as the Disbursing Agent, paid \$5,000,000 to Busbin on the Gonzales Trust's claim. The confirmed Plan provided Trustee

⁶³ Desert Land ECF No. 1627.

⁶⁴ Desert Land ECF No. 1675.

⁶⁵ Apartments ECF No. 239.

⁶⁶ Apartments ECF No. 260.

⁶⁷ Apartments ECF No. 266.

⁶⁸ Apartments ECF No. 263.

⁶⁹ Apartments ECF No. 271.

⁷⁰ Apartments ECF No. 250.

⁷¹ See Apartments ECF No. 306.

⁷² Apartments ECF No. 338.

1 Gupta with a deadline to object to Desert Land's disputed claim, and stated that barring full
2 disallowance, the claim would receive a pro rata distribution.

3 **F. Claim Settlement.**

4 Negotiations to settle the Desert Land claim began between Busbin and Trustee Golden
5 in earnest in February 2021.⁷³ As negotiations advanced, attorney John Fischer for Busbin
6 emailed Ms. Greenwood and Mr. Fiero on June 7, 2021, asking them "not to run up any
7 attorneys fees at this time," expressing confidence that a settlement would be reached without the
8 need for mediation.⁷⁴ Specifically, he stated, "no objection needs to be filed yet."⁷⁵ Although it
9 was never filed, Pachulski Stang sent its draft claim objection to Mr. Fischer on July 15, 2021,
10 and included it in its submission of Trustee Gupta's confidential settlement brief to the
11 Honorable Paul Sala on July 16, 2021.⁷⁶ On July 19, 2021, as the parties prepared for the
12 settlement conference, Mr. Fiero emailed counsel for the other participants a statement of
13 Pachulski Stang's fees to date, which then totaled \$222,283.74.⁷⁷

14 On July 21, 2021, representatives of DLLA, Trustee Golden, Trustee Gupta, Nuti Hart,
15 and Busbin participated in a continued comprehensive settlement conference before the
16 Honorable Paul Sala to address Adversary Proceeding No. 20-01156-gs brought by Trustee
17 Golden against numerous parties (collectively, the "DLLA Parties"). As a result of that
18 conference, on October 18, 2021, Trustee Golden filed a motion seeking approval of the
19 settlement reached between himself, Trustee Gupta, Nuti Hart and Busbin which resolved
20 Trustee Golden's claim in Apartments (Claim Settlement).⁷⁸ Pursuant to the Claim Settlement,
21 Busbin consented to Trustee Gupta paying Trustee Golden \$425,000 using funds which were
22 earmarked for distribution to the Gonzales Trust under Apartments' confirmed chapter 11 Plan.
23 Upon receipt of payment, the Desert Land proof of claim in the Apartments' case was deemed
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25 ⁷³ See Apartments ECF No. 406-7.

26 ⁷⁴ Apartments ECF No. 422.

27 ⁷⁵ *Id.*

28 ⁷⁶ See Apartments ECF No. 426.

⁷⁷ Apartments ECF No. 406-9.

⁷⁸ Desert Land ECF No. 1753.

1 withdrawn with prejudice. The court entered its order approving the Claim Settlement on
2 December 7, 2021.⁷⁹

3 **G. Pachulski Stang's Fee Application**

4 Shortly after the settlement conference, Pachulski Stang filed its Application. It seeks
5 approval of \$211,680 in fees and \$443.74 in expenses for services as special litigation counsel
6 from October 15, 2020 to July 1, 2021.⁸⁰ The Application summarizes the fees within the
7 following general matters:

8 Matter	9 Fees
10 Asset Analysis & Recovery	\$ 67,280.00
11 Bankruptcy Litigation	\$ 101,360.00
12 Case Administration	\$ 4,320.00
13 Claims Objection	\$ 22,240.00
14 Plan and Disclosure Statement	\$ 6,800.00
15 Retention of Professionals	\$ 9,680.00
16 Total Fees	\$ 211,680.00

17
18 The Application was set for hearing on September 16, 2021.

19 Northern Trust and Busbin both objected to the Application. Busbin's objection was
20 particularly damning: he revealed that he was discussing settlement with Trustee Golden to
21 resolve the Desert Land claim using the Gonzales Trust's funds - not funds of the Apartments
22 estate - "simply to avoid incurring huge administrative expenses that would ultimately be
23 paid...to Pachulski Stang if a claim objection were filed."⁸¹ Plainly stated, "the sole reason for
24 settling with Mr. Golden was to avoid the cost of paying Pachulski Stang to litigate a claim
25 objection."⁸²

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27 ⁷⁹ Desert Land ECF No. 1771.

⁸⁰ Apartments ECF No. 373.

28 ⁸¹ Apartments ECF No. 387, p. 9:21-22.

⁸² *Id.* at p. 9:25-26.

Pachulski Stang replied that the time spent by the firm was necessary because, due to conflicts, Nuti Hart was prohibited from sharing any of its work on the substantive consolidation motion with Pachulski Stang.⁸³ Thus, it argued, Pachulski Stang was forced to draft the objection to the Desert Land claim entirely from scratch, with “no choice but to re-invent the wheel.”⁸⁴ Even if Nuti Hart had been available as a resource, the firm argued that “it would be remiss” if it did not independently investigate “each and every factual and legal detail” of the Rule 11 Notice and claim objection.⁸⁵ The firm further pointed out that its assistance with Apartments’ Plan confirmation also conveyed a benefit, and the firm’s fees were not opposed by Busbin or his attorneys until well after the fact. Pachulski Stang also emphasized the over 10% discount it gave Trustee Gupta from its usual rates, totaling over \$26,000.

At the September 16, 2021 hearing on the Application, the court heard argument from Mr. Fiero as well as Mark Wray and Mr. Fischer, both appearing for Busbin. Mr. Fiero again argued that the reduction in the amount of the claim from \$78 million to \$4.5 million was evidence of the value of the firm’s services, an argument which the court again contested, pointing out Pachulski Stang’s own time entries reflecting their investigation of potential Rule 11 sanctions for the filing of the essentially baseless claim. The court also raised the fact that all time spent on the case was billed at \$800 per hour; Mr. Fiero conceded that the firm did not engage any junior associates in its work for Trustee Gupta. Finally, the court challenged Mr. Fiero’s contention that his firm performed work faster than a firm that might charge less per hour would have. Mr. Fiero contended that the time spent was required to put Pachulski Stang in the appropriate negotiation position required to reduce the proof of claim from \$78 million to \$4.5 million.

In his argument, Mr. Wray refuted Mr. Fiero’s claim that Pachulski Stang had to start with a proverbial blank slate on its claim objection, in light of the substantive consolidation documents that had been publicly available on the case docket for over a year prior to the firm’s retention. Additionally, Trustee Gupta had previously detailed the reasons why Desert Land had

⁸³ Apartments ECF No. 389

⁸⁴ *Id.* at p. 4:13-14.

⁸⁵ *Id.* at p. 4:26-27.

1 amended its schedules to delete its claim against Apartments, and had attached a supporting
2 declaration. Mr. Wray also reminded the court that during the course of its employment, the
3 only pleadings Pachulski Stang filed with the court were its employment and fee applications.
4 Mr. Wray described Busbin's shock at the amount of Pachulski Stang's fees as early as April
5 2021, spurring Busbin to begin settlement discussions with Trustee Golden to avoid further fees.
6 Conceding that he did not specify and analyze individual time entries in Busbin's objection, Mr.
7 Wray further posited that the billing categories utilized by Pachulski Stang in its Application
8 were essentially meaningless because time entries pertaining to the same work appeared in
9 multiple billing categories, requiring recategorization to actually determine the amount of time
10 spent on issues such as Rule 11 sanctions. He concluded by requesting a reduction of \$111,000
11 for services outside the scope of employment, and a fifty percent reduction in the fees incurred
12 on the claim objection as excessive.

13 At the conclusion of Mr. Wray's argument, Mr. Fiero requested that the court hear from
14 Trustee Gupta as to the necessity and reasonableness of its services. The court agreed,
15 determining that an evidentiary hearing was required to ascertain the necessity and
16 reasonableness of Pachulski Stang's fees. The evidentiary hearing on the Application was set for
17 October 1, 2021.⁸⁶

18 At the evidentiary hearing, Mr. Fiero called Trustee Gupta as the first witness. She
19 disclosed that she interviewed four law firms in her pursuit of special litigation counsel, two in
20 Nevada and two in California. She stated that one Nevada firm had a conflict of interest and
21 lacked the appropriate experience to address Trustee Golden's claim; the second Nevada law
22 firm lacked adequate staffing and was more expensive on an hourly basis than Pachulski Stang;
23 and the other California law firm did not have availability to handle the matter. Trustee Gupta
24 further revealed that upon her initial review of Trustee Golden's claim, she thought the claim
25 lacked credibility such that a Rule 11 sanctions motion for its filing might be warranted, a first in
26 her over 30 years of practice. She also testified that she asked Pachulski Stang to perform work
27 regarding Trustee Golden's Rule 3018 motion filed in the Apartments case, due to a conflict on

28 ⁸⁶ Apartments ECF No. 394.

1 the part of her general counsel. Trustee Gupta asserted that she was unaware that no “catchall”
 2 provision was included in the Employment Application which would encompass the work
 3 performed by Pachulski Stang.

4 In response to the court’s questioning, Trustee Gupta further testified that she did do a
 5 cost-benefit analysis when she retained Pachulski Stang, negotiating a reduced hourly rate for the
 6 firm’s attorneys. As to staffing the matter with only senior level attorneys instead of less
 7 expensive junior level attorneys for tasks such as research, Trustee Gupta said she had no issue
 8 with that and saw the benefit of continuity in the attorney representation.

9 During his testimony, Mr. Fischer stated that he learned Pachulski Stang was seeking
 10 over \$200,000 in fees sometime between April and June of 2021. He reiterated that the reason
 11 why Busbin commenced settlement negotiations with Trustee Golden was to keep litigation costs
 12 down, agreeing to pay \$425,000 after they were informed that Pachulski Stang’s fees already
 13 exceeded \$200,000. In furtherance of that objective, he also stated that he asked Pachulski Stang
 14 to stop work on the objection to claim in light of the settlement negotiations. Additionally,
 15 contrary to Pachulski Stang’s assertion that its draft claim objection was key to the settlement,
 16 Mr. Fischer testified that the structure and parameters of the settlement were largely negotiated
 17 in the months prior to the settlement conference on July 21, 2021, with the conference simply
 18 serving to get the settlement “over the goal line.”

19 At the conclusion of the evidentiary hearing, the court took the Application under
 20 advisement.

21 Legal Standards

22 The legal standards for compensation of an estate’s professionals are well established.
 23 Compensation of professionals employed under § 327(a) is governed by § 330(a). A court may
 24 award professionals “reasonable compensation for actual, necessary services rendered by the ...
 25 attorney and by any paraprofessional person employed by any such person; and ...
 26 reimbursement for actual, necessary expenses.”⁸⁷ The court is required to examine the fee
 27 application to ensure that it is reasonable, and may award less than the amount requested.⁸⁸

28 ⁸⁷ 11 U.S.C. § 330(a)(1).

⁸⁸ 11 U.S.C. § 330(a)(2).

Specifically, the court is not to allow fees for (1) “unnecessary duplication of services” or “services that were not – (i) reasonably likely to benefit the debtor’s estate, or (ii) necessary to the administration of the estate.”⁸⁹

To determine the reasonable amount of compensation, the Code requires the court to “consider the nature, the extent, and the value” of the professional’s services, enumerating the following non-exclusive factors courts should take into account:

- (A) the time spent on such services;
- (B) the rates charged for such services;
- (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
- (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; ... and
- (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.⁹⁰

To receive compensation under § 330(a), “a professional need demonstrate only that the services were reasonably likely to benefit the estate at the time rendered.”⁹¹ The Bankruptcy Appellate Panel in *Garcia* established five factors courts consider in determining whether services were reasonably likely to benefit the estate:

- (a) Were the services authorized?
- (b) Were the services necessary or beneficial to the administration of the estate at the time they were rendered?
- (c) Are the services adequately documented?
- (d) Are the fees required reasonable, taking into consideration the factors set forth in section 330(a)(3)?

⁸⁹ 11 U.S.C. § 330(a)(4)(A).

⁹⁰ 11 U.S.C. § 330(a)(3).

⁹¹ *Ferrette & Slater v. United States Trustee (In re Garcia)*, 335 B.R. 717, 724 (B.A.P. 9th Cir. 2005).

(e) In making the determination, the court must consider whether the professional exercised reasonable billing judgment.⁹²

Analysis

A. The Scope of Employment.

Initially, the court must address the scope of Pachulski Stang's employment. Trustee Gupta sought to employ the law firm as special counsel. She already hired well-qualified general counsel that had been involved since she had been appointed chapter 11 trustee. Special counsel was required only because a conflict had arisen with Nuti Hart from its prior representation of Desert Land that precluded its involvement with the claim objection. Pachulski Stang sought employment as special counsel for that limited purpose.

The Bankruptcy Code specifically authorizes employment of special counsel under § 327(e) using a less rigorous standard than § 327(a). Employment under § 327(e) is limited to special purposes where counsel does not have an interest adverse to the one for which it specially represents the estate.⁹³ But, where proposed counsel did not previously represent the debtor or the estate, he or she may still be employed for a special purpose under § 327(a). It is the scope of the application that controls, not the section under which employment is sought.

Trustee Gupta's application to employ Pachulski Stang as special counsel advised that the estate was retaining the law firm "as special litigation counsel for the above-captioned estate to investigate and object to the Claim (defined below)..."⁹⁴ The Claim is defined as Desert Land's Proof of Claim No. 3-1 filed on September 23, 2020. The entirety of the Employment Application is directed toward objecting to the Desert Land claim. The relief sought was employment as special litigation counsel "to represent the Trustee in connection with the investigation and objection to the Claim."⁹⁵

⁹² *Id.*

⁹³ *In re Sonya D. Int'l, Inc.*, 484 B.R. 773, 780 (Bankr. C.D. Cal. 2012) (citing *In re Fondiller*, 15 B.R. 890, 892 (B.A.P. 9th Cir. 1981) (emphasis added), *appeal dismissed*, 707 F.2d 441 (9th Cir.1983)).

⁹⁴ ECF No. 187 at 1:26-2:1.

⁹⁵ ECF No. 187 at 4:14-15.

1 The Employment Application concludes with a prayer that Pachulski Stang be retained
 2 “to perform the legal services described in the Fiero Declaration, effective October 15, 2020.”⁹⁶

3 That declaration includes the following:

- 4 5. The Trustee desires to retain PSZJ at the expense of the estate,
 5 to undertake such tasks as required by the Trustee, including
 6 but not limited to the following:
- 7 (a) Investigating and advising the Trustee concerning the legal
 8 and factual issues raised by the Claim filed by Desert Land
 9 in the amount of “at least \$78,000,000” on the alleged
 10 ground that the Debtor and Desert Land should be
 11 substantively consolidated and/or that the Debtor is an alter
 12 ego of Desert Land;
 - 13 (b) Advising the Trustee concerning the rights and remedies of
 14 the estate in regard to the Claim, an objection to the Claim,
 15 and any related litigation;
 - 16 (c) Representing the Trustee in connection with an objection to
 17 the Claim and any related litigation to the extent the
 18 Trustee deems appropriate, including potential causes of
 19 action against Desert Land and related parties;
 - 20 (d) Conducting examinations of witnesses, claimants, or
 21 adverse parties and preparing and assisting in the
 22 preparation of motions, applications, answers, orders,
 23 memoranda, reports and accounts;
 - 24 (e) Advising the Trustee concerning the requirements of the
 25 Bankruptcy Code, the Bankruptcy Rules, the Local Rules
 26 and the requirements of the United States Trustee relating
 27 to the administration of the estate; and
 - 28 (f) Rendering such other advice and services as the Trustee
 may require in connection with this case or the Claim.⁹⁷

24 During the Application hearing, Mr. Fiero suggested that his declaration provided
 25 authorization for his firm to provide services beyond the claim objection. The court strongly
 26

28 ⁹⁶ ECF No. 187 at 6:13-14.

⁹⁷ ECF No. 188 at 2:17-3:8.

disagrees and finds this argument to be disingenuous. As recently discussed by the United States Bankruptcy Court for the Southern District of Texas:

The order authorizing an estate professional's employment establishes the scope of work the professional may perform. Estate professionals are not entitled to compensation for work exceeding the scope of the order authorizing the professional's employment. The Court retains the power to determine the scope of its Retention Order.⁹⁸

By its terms, the language of the Employment Order simply grants the Employment Application. It does not encompass or even reference Mr. Fiero's declaration in support of the Employment Application. The court is not, therefore, bound by any expanded employment provisions set forth in Mr. Fiero's declaration. The Employment Application clearly contemplated Trustee Gupta's employment of Pachulski Stang as special counsel for the narrow purpose of pursuing the objection to the Desert Land claim, and nothing more. Nothing was presented to the court concerning any expanded scope of representation at the hearing on the Employment Application. Again, the representation was limited to the claim objection.

The scope of representation is particularly concerning given the court's concern with the estate incurring additional fees as discussed at the hearing on the Employment Application. Nuti Hart had more than competently represented the estate throughout Trustee Gupta's tenure. Conflict counsel was appropriate to object to Desert Land's proof of claim given Nuti Hart's prior representation of the Desert Land estate. The conflict necessarily informed the scope of Pachulski Stang's representation. There was no need for additional representation of the estate, and none was ever presented to the court or Busbin. To the extent that Pachulski Stang performed legal services beyond the claim objection, such services were not authorized and duplicated Nuti Hart's general representation of the estate. Any such services cannot be compensated.

Upon review of the Application, the most obvious of these unauthorized billings relates to Apartments' Plan and disclosure statement. The Application states that Pachulski Stang billed 8.5 hours, resulting in \$6,800.00 in fees, for work on the Plan and disclosure statement. As for

⁹⁸ *In re Mohiuddin*, 627 B.R. 875, 880 (Bankr. S.D. Tex. 2021) [internal citations omitted].

any discussion, the Application simply says in its entirety: “During the Fee Period, the Firm, among other things: (i) reviewed and analyzed the Debtor’s Plan and disclosure statement; (ii) reviewed and considered the Desert Land Trustee’s motion to allow claims for voting purposes; and (iii) prepared for and attended several Plan and disclosure statement hearings.”⁹⁹ Such services were not authorized and impinge on Nuti Hart’s representation.

Additionally, Pachulski Stang’s Application references conferences with Trustee Gupta and estate professionals regarding case issues and status, work done on the Desert Land Motion to Dismiss and research concerning a potential appeal. These services are also beyond the scope of Pachulski Stang’s limited employment and cannot be compensated.

The problem presented is that neither the Application nor the billing statements provide any separation of the specific tasks undertaken. “Proper categorization allows the bankruptcy court to evaluate the reasonability of not just the individual entries but also the total entries in the category.”¹⁰⁰ A review of the billing statements shows that time entries for work related to the Plan, for example, can be found in categories other than the one actually designated for that work. Accordingly, the court was obliged to recategorize Pachulski Stang’s time entries attached to its Application.¹⁰¹ Doing so revealed that the law firm spent meaningful time on the Desert Land Motion to Dismiss and the Apartments Plan and disclosure statement. Minimal time was spent reviewing objections to fee applications in the Desert Land case. All of these matters, however, are outside the scope of the employment of special counsel.

The court is aware that arguments can be made that somehow these matters could shade into Pachulski Stang’s scope of employment to investigate and object to the Desert Land claim. Dismissal of the Desert Land bankruptcy was premised upon the debtor’s promise to withdraw the claim in the Apartments bankruptcy. And Desert Land moved to vote its amended claim as part of Apartments’ confirmation. But Apartments was not a creditor in the Desert Land case. It

⁹⁹ ECF No. 373 at 12:25-13:2.

¹⁰⁰ *Phillips v. Gilman (In re Gilman)*, 2019 WL 3096872, at *11 (B.A.P. 9th Cir. July 12, 2019), *aff’d sub nom. Phillips v. Gilman*, 836 F. App’x 511 (9th Cir. 2020).

¹⁰¹ The court will enter a supplement to this decision detailing its re-categorization of Pachulski Stang’s billing statements.

1 had no standing to be heard on the Motion to Dismiss. Even if it did, that was a matter for Nuti
2 Hart as general counsel. Similarly, Desert Land was allowed to vote its amended claim for
3 Apartments' Plan. Not only was the motion not contested by Trustee Gupta, it was handled by
4 Nuti Hart. Finally, there is no explanation offered why special counsel would incur any fees to
5 review fee applications, especially those filed in Desert Land.

6 The billings related to the Motion to Dismiss, Plan confirmation, and review of
7 objections to fee applications fall outside the scope of Pachulski Stang's employment as special
8 counsel. The fees related to these matters will be disallowed.

9 The amount of time spent on these matters is also complicated. The Application stated
10 that \$6,800 was billed for time working on the Plan and disclosure statement. This
11 characterization of the matter appears to be strictly applied to the drafting of the Plan and
12 disclosure statement. But Pachulski Stang also spent considerable time addressing Desert Land's
13 motion to allow its claim for purposes of the confirmation process. Such billings are equally
14 beyond the scope its employment. The court has examined the billing statements and calculates
15 that Pachulski Stang billed 41 hours for \$32,800 working on matters related to Apartments'
16 reorganization efforts comprised of the Plan and disclosure statement, the motion to allow
17 claims, attending various hearings regarding confirmation (for both Mr. Fiero and Ms.
18 Greenwood) and even reviewing the findings of fact and conclusions of law in support of
19 confirmation. This amount will not be allowed.

20 The billings related to the Motion to Dismiss and the fee objections are overwhelmingly
21 included within the bankruptcy litigation matter addressed in the Application. The court has
22 identified 21.2 hours for \$16,960 in fees related to the Desert Land Motion to Dismiss. This
23 includes conferences, drafting a joinder that was never filed, and attending hearings on the
24 Motion to Dismiss. Once again, the court sees no reason why special counsel should have
25 undertaken any time on this matter. While dismissal of the Desert Land bankruptcy may have
26 effectively removed its claim in the Apartments' bankruptcy, Apartments had no recognized
27 interest in the underlying Motion to Dismiss. Moreover, Nuti Hart was capable of monitoring
28

1 the motion and hearings. The \$16,960 in fees related to the Desert Land Motion to Dismiss will
2 not be allowed.

3 The court has also identified 2.3 hours for \$1,840 in billings for reviewing objections to
4 fee applications in the Desert Land bankruptcy. While this amount is relatively small, these
5 billings are also well outside the investigation and objection to Desert Land's proof of claim.
6 They are also not reasonably necessary to the performance of its employment as special counsel
7 and shall not be allowed.

8 In summary, Pachulski Stang was employed to address one proof of claim. Billings for
9 time related to the Motion to Dismiss, Plan matters, and review of Desert Land fee applications
10 are outside the scope of its employment as special counsel. Because such billings are beyond the
11 scope of its employment they were not authorized by the court. Those fees, totaling \$51,600, are
12 disallowed.¹⁰²

13 **B. The Reasonableness of the Fees Requested for the Claim Objection.**

14 Based on the Application, the time billed for Asset Analysis & Recovery, Bankruptcy
15 Litigation, and Claims Objection appear to comprise the work related to resolving Desert Land's
16 proof of claim. Those matters total \$190,880.00. But as detailed above, the court has already
17 excluded a total of \$51,600 in fees as services beyond the scope of Pachulski Stang's
18 employment. This leaves a total of \$160,080 as the total fees related to the claim objection,
19 including the time related to its Employment Application.

20 Regardless of the exact amount of the fees billed for the claim objection, Busbin argues
21 that these hours, and the resulting fees, are not commensurate with the complexity and nature of
22 Pachulski Stang's limited representation. As part of this objection, he complains that the law
23 firm did not exercise reasonable billing judgment. "Professionals always must exercise proper
24

25 ¹⁰² See *In re Churco*, 2008 WL 1734228, at *5 (Bankr. N.D.N.Y. Apr. 10, 2008) (quoting *In re*
26 *New England Fish Co.*, 33 B.R. 413, 418 (Bankr.W.D.Wash.1983)) ("courts have consistently
27 held that professionals who render services to bankruptcy estates without court approval forfeit
28 their right to compensation from the estate."); see also *Mohiuddin*, 627 B.R. at 883-84 (Bankr.
S.D. Tex. 2021) (denying special counsel's fees for assisting in liquidating estate assets where
general counsel was employed to provide those services and such services fell outside the scope
of special counsel's employment).

1 billing judgment.”¹⁰³ Reasonable billing judgment requires a professional to consider the
 2 following three inquiries:

- 3 (a) Is the burden of the probable cost of legal services
 4 disproportionately large in relation to the size of the estate and
 5 maximum probable recovery?
- 6 (b) To what extent will the estate suffer if the services are not
 7 rendered?
- 8 (c) To what extent may the estate benefit if the services are
 9 rendered and what is the likelihood of the disputed issues
 10 being resolved successfully?¹⁰⁴

11 These factors are not the issue in this instance. It was necessary for Trustee Gupta to
 12 object to Desert Land’s claim. But bankruptcy courts are also instructed to “examine the
 13 circumstances and the manner in which services are performed and the results achieved in order
 14 to arrive at a determination of a reasonable fee allowance.”¹⁰⁵ This factor encourages a much
 15 more qualitative review of the billings in light of the context of the case. In *Mednet* the
 16 Bankruptcy Appellate Panel explained that “in making this determination, the court must take
 17 into consideration whether the professional exercised reasonable billing judgment.”¹⁰⁶ As stated
 18 in *In re Riverside-Linden Investment Co.*, “[w]hen a cost benefit analysis indicates that the only
 19 parties who will likely benefit from [a service] are the trustee and his professionals,” the service
 20 is unwarranted and a court does not abuse its discretion in denying fees for those services.¹⁰⁷

21 Put more bluntly, “[d]espite the outcome of any case, once it becomes reasonably
 22 obvious that further litigation would not benefit the estate, the attorney must scale back its
 23 services.”¹⁰⁸ “A professional cannot ignore a likely result, but must exercise billing

24 ¹⁰³ *Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswick Drug Co. (In re Mednet)*, 251 B.R. 103,
 25 109 (9th Cir. BAP 2000).

26 ¹⁰⁴ *Garcia*, 335 B.R. at 74.

27 ¹⁰⁵ *In re Mednet*, 251 B.R. at 108.

28 ¹⁰⁶ *Id.*

¹⁰⁷ 925 F.2d 320, 321 (9th Cir. 1991) [citation and internal quotation marks omitted].

¹⁰⁸ *Auto Parts Club*, 211 B.R. at 35; see also *Mednet*, 251 B.R. at 108 n.7 (quoting *Unsecured Creditors’ Comm. v. Puget Sound Plywood, Inc.*, 924 F.2d 955, 961 (9th Cir.1991)) (“[The attorney] had an obligation to...balance the effort required against the results that might be achieved. Absent unusual circumstances, an attorney must scale his or her fee at least to the reasonably expected recovery.”).

judgment.”¹⁰⁹ This lead the Ninth Circuit to affirm a bankruptcy court’s fifty percent fee reduction for chapter 7 trustee’s counsel, in a situation similar to the one before the court where “although the litigation may have had some merit, the degree to which it was pursued was unnecessary.”¹¹⁰

Pachulski Stang defends its fees by citing to the amount of Desert Land’s original proof of claim. It contends that its fees were warranted to defeat a claim in excess of \$78 million. As in all things, context is crucial. Pachulski Stang did reduce Desert Land’s claim from more than \$78 million to \$4,500,000. But this is comparable to the big bad wolf blowing down the house of straw: there wasn’t much to the claim. The overwhelming bulk of this claim rested on theories of substantive consolidation and alter ego. This court is unaware of any bankruptcy that has substantively consolidated two bankruptcy estates through a proof of claim (and after they have been largely administered). More importantly, the court had previously denied a motion for substantive consolidation and had proceeded to administer the bankruptcy estates. Alter ego, on the other hand, is the extension of liability generally to an entity’s owners, though the doctrine of reverse alter ego permits imposition of the individual owner’s liability upon the entity.¹¹¹

There is nothing in the record to suggest that Desert Land’s claim for \$73.5 million in damages beyond the account stated had any substantive merit. Indeed, Trustee Gupta testified that she considered the claim to be frivolous from the outset. And this is where the problem arises. Pachulski Stang similarly argued that the claim was patently frivolous, but it billed more than \$200,000 in fees over a nine-month period to deal with Desert Land’s allegedly meritless claim without ever filing a claim objection or even taking any discovery.

Instead, prior to approval of its employment Pachulski Stang dove into the matter as if a claim objection hearing was imminent. It dedicated two partners to the task. The billing statements through December 10, 2020, reflect that Ms. Greenwood was primarily responsible for the Employment Application, research, and preparation of the Rule 11 Notice and motion.

¹⁰⁹ *Lobel & Opera v. U.S. Trustee (In re Auto Parts Club, Inc.)*, 211 B.R. 29, 35 (B.A.P. 9th Cir. 1997).

¹¹⁰ *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 861 (9th Cir. 2004).

¹¹¹ *See Certain v. Sunridge Builders, Inc.*, 431 P.3d 38, at **1-2 (Nev. Nov. 28, 2018).

1 Mr. Fiero primarily reviewed and edited the work, conferred with Ms. Greenwood and Trustee
2 Gupta, and attended the December 10, 2020 hearings on the Employment Application and the
3 Motion to Dismiss.¹¹² Through December 10, 2020, Pachulski Stang billed the estate \$128,720.

4 Busbin argues that this is just too much for filing an Employment Application and
5 sending the Rule 11 Notice for a frivolous proof of claim. The strategy succeeded as Desert Land
6 withdrew its claims for substantive consolidation and alter ego. But the hours and fees are
7 simply overkill. There was no reason why the estate had to immediately adopt such a “shock and
8 awe” approach to Desert Land’s claim. And while it was effective, it came disproportionately at
9 the expense of the creditors.

10 The above discussion applies overwhelmingly to Desert Land’s claim for substantive
11 consolidation and alter ego. But it bears mention that despite the time spent on the Rule 11
12 Notice and proposed motion, Desert Land continued to pursue its claim for the \$4,500,000
13 account stated. Pachulski Stang never moved for sanctions. Indeed, it never filed the objection
14 to the amended claim. The court notes that the basis for the objection to the account stated
15 portion of the Desert Land claim had been largely developed by Nuti Hart, leading to Desert
16 Land’s amendment of its schedules to remove the debt.¹¹³

17
18 ¹¹² The court’s primary concern is that the fees for the claim objection were excessive in light of
19 the nature and basis of Desert Land’s claim. Employing two lawyers, each billing \$800, for a
20 single claim objection that was never filed certainly increased the billings. Ms. Greenwood was
21 the attorney responsible for the majority of the work on the matter and Mr. Fiero appears to have
22 acted in more of an advisory, administrative, and consulting nature. His time billed is not
23 outrageous. But given the limited matter at issue, two attorneys were not required. Mr. Fiero’s
24 involvement largely duplicated and expanded the time incurred. The court examined Pachulski
25 Stang’s billing records and calculated at least \$17,000.00 in billing by Mr. Fiero that duplicated
26 Ms. Greenwood’s time. Additional time was spent reviewing Ms. Greenwood’s work. The court
27 notes that both attorneys appeared at hearings and participated in meetings or phone calls. It
28 appears that Pachulski Stang made some effort not to bill both attorneys for all calls, meetings or
emails. But the point is that having two attorneys bill on this claim objection unnecessarily
increased the fees as the time for the second attorney often would not have even occurred had
only one attorney been working on the case. Given the expertise suggested by the hourly rates of
counsel, one attorney should have been adequate to handle this matter. Once again, the point is
not that two attorneys were precluded from working on the claim objection, but the billings and
the nature of the representation clearly demonstrate that it was inefficient, unnecessary, and not
reasonably calculated to benefit the estate.

¹¹³ See Apartments ECF No. 175.

1 The lack of a claim objection may be attributed in some part to the court's ruling in
2 December 2020, that it would dismiss the Desert Land bankruptcy. As part of the dismissal
3 Desert Land, once out of bankruptcy, was to withdraw the proof of claim. But the court
4 converted Desert Land to chapter 7 in March 2021. By that time, settlement discussions had
5 begun on Desert Land's claim. Pachulski Stang's time related to the claim objection after March
6 was dedicated to settlement discussions and arranging a settlement conference, with a notable
7 exception. Over three days Pachulski Stang billed \$17,280 to draft the objection to Desert
8 Land's claim. This was done in early June 2021 when all parties were proceeding towards
9 mediation. Within days of the work on the claim objection, Busbin's counsel asked Pachulski
10 Stang to stand down as it was thought that the parties were close to a settlement even without the
11 settlement conference.

12 The court is well aware of the danger of arm-chair quarterbacking of the parties'
13 litigation decisions, especially those of a trustee. But this Application does not come before the
14 court on a blank slate. The court has been involved in the administration of these jointly
15 administered cases for years and has overseen the sale of the real property and observed the
16 fallout. The court's natural hesitancy to avoid second-guessing litigation decisions is tempered
17 in this case by its efforts to express its concern of over-litigation and excessive fees at the outset
18 of Pachulski Stang's employment. At the hearing on its Employment Application the court
19 noted Pachulski Stang's bankruptcy expertise, but also its billing rates and the potential to incur
20 significant fees quickly in what the court viewed as a not so significant matter. The court
21 attempted to impress upon Pachulski Stang the need for the law firm to efficiently apply its
22 expertise to the lone claim objection it was retained to resolve.

23 Busbin, the true beneficiary of Pachulski Stang's services, is adamant that this did not
24 happen. His counsel filed the joint bankruptcies, moved to appoint the trustee, and remained
25 active after the sales of real property. Busbin's counsel were active participants in dealing with
26 Desert Land, and particularly in settling the claim. The \$17,280 in fees incurred immediately
27 prior to a settlement conference supports Busbin's objection, particularly in light of the advanced
28 state of negotiations as evidenced by Mr. Fischer's testimony and his email asking Trustee Gupta

1 to stand down just days after Pachulski Stang drafted the claim objection.¹¹⁴ Indeed, this is
2 supported by the settlement brief Pachulski Stang submitted noting that the settlement was being
3 funded by Busbin and that he had previously offered \$350,000 to resolve Desert Land's claim.
4 The brief was clear that Trustee Gupta, then acting as the disbursing agent, was "prepared to
5 increase the settlement offer only to the extent that Gonzales wishes to increase a payment from
6 the Debtor's assets available to creditors."¹¹⁵

7 Trustee Gupta testified during the evidentiary hearing as to the retention of Pachulski
8 Stang. She testified she interviewed other law firms, including a Nevada law firm that was even
9 more expensive than Pachulski Stang. She noted that Pachulski Stang had reduced its hourly
10 fees, and testified that she was not concerned that two attorneys, each billing \$800 per hour,
11 would be working the claim objection. Her testimony demonstrated that she conducted an
12 investigation to hire counsel, considered the matter and exercised her discretion in retaining
13 Pachulski Stang. The court has no problem with the estate's retention of Pachulski Stang. The
14 firm was qualified and capable; that is why the court approved the Employment Application.
15 But having retained a law firm billing at the rates Pachulski Stang charged, to handle what
16 Trustee Gupta recognized to be one frivolous claim, it was incumbent upon her to utilize the law
17 firm properly. Pachulski Stang was supposed to be used surgically to resolve the Desert Land
18 claim. This is not what happened.

21 ¹¹⁴ See Apartments ECF No. 422. The court is also aware that on April 7, 2021, Mr. Fischer
22 emailed Pachulski Stang seeking to review a copy of Trustee Gupta's objection to the Desert
23 Land claim before it was filed. See Apartments ECF No. 421. While this may seem like a
24 contradiction, the posture of the case was markedly different in April 2021 when Mr. Fischer
25 acknowledged Pachulski Stang's preparation of a claim objection than it was in June 2021 when
26 Mr. Fischer asked that Trustee Gupta not file an objection. Had Pachulski Stang drafted the
27 claim objection in the spring of 2021, the court might perceive the reasonableness of those
28 services differently. Instead, Pachulski Stang waited until settlement negotiations were
advanced, and even appeared to suggest that Trustee Gupta might prefer pursuit of the claim
objection over settlement. See Apartments ECF No. 406-12. Pachulski Stang's delay in drafting
the claim objection until negotiations were at an advanced stage significantly impacts the court's
view of the reasonableness of those services.

¹¹⁵ Apartments ECF No. 428 at 9.

In sum, the court finds the fees charged for the work related to the claim objection to be excessive. As stated by the Third Circuit Court of Appeals, “[a] Michelangelo should not charge Sistine Chapel rates for painting a farmer’s barn.”¹¹⁶ “[W]hen considering an award of attorneys’ fees, the court is not required to go line-by-line through the billing records... ‘trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney’s time.’”¹¹⁷ Indeed, “[t]he court may use a percentage deduction ‘as a practical means of trimming fat from a fee application.’”¹¹⁸ This is just such a situation where a percentage reduction is appropriate for the time spent on the claim objection. Both Trustee Gupta and special counsel had an obligation to maximize the recovery to the estate. The hours spent on the claim objection reflect a lack of billing judgment given the circumstances of this case: a vaguely stated conclusory claim filed by an affiliated debtor which had already been debunked in prior actions and by the estate’s general counsel.

The court has attempted to better understand the work performed on the claim objection. Reviewing the billing statements, the fees break down into these general categories:

Application to Employ	14.1	\$ 11,280
Claim Objection	162.3	\$129,840
Settlement Negotiations	23.7	\$ 18,960

The court does not consider the objections raised to be directed towards the Employment Application (and supplement) or the settlement negotiations. Those amounts will be allowed. Rather, the opposition directed towards the claim objection is targeted primarily to the work related to the Rule 11 Notice and motion.

¹¹⁶ *Ursic v. Bethlehem Mines*, 719 F.2d 670, 677 (3d Cir. 1983).

¹¹⁷ *Rodriguez v. National Funding, Inc. (In re Rodriguez)*, 2020 WL 1672773, at *5 (B.A.P. 9th Cir. Mar. 26, 2020) (quoting *Fox v. Vice*, 563 U.S. 826, 838 (2011)); see also *In re Coxeter*, 2012 WL 7070198, at *9 (Bankr. E.D. Cal. Nov. 6, 2012) (quoting *Lunday v. City of Albany*, 42 F.3d 131, 134 (2d Cir. 1994)) (“[A] bankruptcy court is not required to ‘set forth item-by-item findings concerning what may be countless objections to individual billing items.’”); *Saunders v. Salvation Army*, 2007 WL 927529, at *3 (S.D.N.Y. Mar. 27, 2007) (“Rather than comb through detailed time sheets, a court can ‘exclude excessive and unreasonable hours from its fee computation by making an across-the-board reduction in the amount of hours.’”).

¹¹⁸ *Coxeter*, 2012 WL 7070198, at *9 (quoting *McDonald ex rel Prendergast v. Pension Plan of the NYSA–ILA Pension Trust Fund*, 450 F.3d 91, 97 (2d Cir. 2006)).

1 The court agrees that a 40% reduction of the above referenced fees related to the claim
2 objection is appropriate. This roughly equates to the time spent on the Rule 11 Notice and
3 motion and drafting the claim objection in June 2020, plus a further reduction for the impact of a
4 second lawyer working on the same matters.¹¹⁹ There was nothing wrong with working on a
5 Rule 11 motion. It is the amount of time spent, together with the underlying work on the claim
6 analysis and drafting the memorandum that lead the court to conclude there was simply too much
7 time and fees billed, especially given that nothing was ever filed with the court, even on the
8 portion of the claim related to the account stated.

9 As discussed above, the timing of the claim objection is suspect given the impending
10 settlement conference, prior negotiations, and Busbin's request to stand down. This may
11 oversimplify the analysis as all the time spent on the Rule 11 Notice and motion is not subject to
12 disallowance, just as not all of the time on the other components was reasonable. But it does
13 satisfy the court that a 40% reduction of the time collected in the claim objection is warranted.

14 Finally, in reviewing all the time, the court again notes that two attorneys billing \$800 per
15 hour were not required to address one claim that was deemed frivolous. Two lawyers working
16 on the claim objection was a luxury that came directly at Busbin's expense. The time needed to
17 confer, email, and revise the other's work needlessly increased the fees in this instance, not to
18 mention the instances when both attorneys attended conference calls or hearings. The record
19 does not establish why this was necessary or reasonable.

20 For these reasons, the court will exercise its discretion to disallow \$50,000 in fees billed
21 by Pachulski Stang for services related to Desert Land's proof of claim.

22 Conclusion

23 The court concludes that Pachulski Stang seeks compensation for work beyond the scope
24 of its limited representation and that it did not exercise proper billing judgment in its attempt to
25 resolve the Desert Land proof of claim. Accordingly, the court will enter an order granting in
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28 ¹¹⁹ That work is not the entire basis for the reduction, but it serves as a reference point for the
court when evaluating the appropriate amount of the reduction.

1 part and denying in part the Application, disallowing the following fees billed by Pachulski
2 Stang:

3	Plan Confirmation	\$	32,800.00
4	Desert Land - Motion to Dismiss	\$	16,960.00
5	Fee Objections	\$	1,840.00
6	Excessive Fees for Claim Objection	\$	<u>50,000.00</u>
	Total disallowance	\$	101,600.00

7 The court will issue a supplement with its numerical analysis of Pachulski Stang's fees
8 and will enter an order memorializing this ruling.

9 * * * * *

10 Copy sent to all parties and/or their counsel via CM/ECF Electronic Notice.

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